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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-195

METROMEDIA, INC., et al.,
Appellants,

vs.

CITY OF SAN DIEGO, et al.,
Appellees.

BRIEF IN SUPPORT OF APPELLEE FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

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BRIEF IN SUPPORT OF APPELLEE FILED BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

STATEMENT OF INTEREST

The City and County of San Francisco (hereinafter, "San Francisco") adopted a comprehensive sign ordinance in 1965. That ordinance prohibits off-site advertising ("general advertising") signs in all residential, neighborhood shopping, and public use districts. The ordinance also establishes certain "special sign districts"[1] and prohibits general advertising signs

[1] Among the special sign districts established by this ordinance are the following: Areas within 100 feet of residential districts where the sign is to be viewed primarily from residentially-zoned property; areas within 100 feet of certain schools; areas within 200 feet of public

(Footnote continued on following page)

in those districts. Nonconforming signs are required to be removed after specified amortization periods.

San Francisco's sign ordinance exempts from its provisions various categories of signs, including, among others,

> Temporary display posters, without independent structural support, in connection with political campaigns and with civic non-commercial health, safety and welfare campaigns, provided that in R districts such posters shall be removed within 60 days following the conclusion of the campaign [and]
>
> . . . temporary displays of a patriotic, religious, charitable or civic character.[2]

San Francisco has been engaged in litigation for over five years against two billboard companies (one of which is Appellant Metromedia, Inc.). That litigation seeks the removal of the off-site advertising signs which are located in the above-mentioned freeway and Market Street sign districts. The defendants in that litigation own approximately 1,000 off-site advertising signs in San Francisco,[3] approximately eighty of which are located in the freeway and Market Street sign districts. Although San Francisco's sign ordinance is not a

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(footnote continued from previous page)
parks and recreational facilities; Civic Center area; Candlestick Park area; areas near freeways where the sign is primarily to be viewed traveling on the freeway; certain designated scenic streets; areas near rapid transit routes; on and near Market Street from the Embarcadero to the Central Skyway Overpass; in Jackson Square; on and near Market Street from the Central Skyway Overpass to Diamond Street.

[2] City Planning Code (Part II, Chapter II, San Francisco Municipal Code) Section 603. That section also exempts, among others, official public notices, government signs for traffic control, commemorative plaques, and religious symbols.

[3] San Francisco's jurisdictional boundaries contain approximately forty-nine (49) square miles of land area.

"total ban" on billboards, defendants there have raised numerous defenses involving constitutional issues, including the free speech and due process claims asserted by Appellants in this case.

In the November, 1977, San Francisco municipal election, a declaration of policy calling for the total ban of billboards[4] was submitted to the San Francisco voters by their Board of Supervisors. That ballot measure was rejected.

San Francisco's interest in this litigation stems in part from the possibility that the people of San Francisco may yet decide, either directly or through their elected representatives, to adopt legislation which will eventually eliminate billboards altogether within the city. San Francisco's primary concern, however, is that the arguments advanced by Appellants, if accepted by this Court, will seriously impair, if not entirely defeat, our ability to enforce our present off-site advertising regulations.

This brief is submitted pursuant to Supreme Court Rule 36.4. San Francisco has read the briefs submitted by Appellee (hereinafter, "San Diego") and by Amicus Curiae City of Alameda in support of San Diego. San Francisco agrees with the positions taken in those briefs and does not intend to reiterate the arguments contained therein. Rather, the purpose of San Francisco's brief is to demonstrate that Appellants really seek protections for their businesses far beyond those properly afforded by the First and Fourteenth Amendments. The standards of review which Appellants propose for regulation of, as well as a prohibition against, outdoor advertising are unrealistic and fail to balance fairly the competing public and private interests involved.

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[4] That ballot measure, known as "Proposition W," framed the policy question as follows: "Should the Board of Supervisors enact legislation which would phase out those billboards containing off-site advertising over a period allowing full amortization of costs to billboard companies?"

SUMMARY OF ARGUMENT

The importance of this case lies not in the immediate result regarding the validity of San Diego's sign ordinance. Rather, what is at stake here is the ability of states and local governments under the police power to protect the environmental quality of life for their citizens by prohibiting or regulating the blight of billboards.

This case involves a zoning and land use regulation. Appellants would have this Court believe that critical First Amendment issues are presented in this case. However, no one claiming entitlement to, or need for, communication of an idea or concept has come forward to assert that San Diego's ordinance has crippled his exercise of this important right.

Therefore, this Court should not be led into the dangerous maze of legislative inquiry implicit in the strict scrutiny standard of review where fundamental rights are involved. Rather, the standard of review applied by the California Supreme Court should be affirmed by this Court as it poses a workable framework for balancing the competing public and private interests. In determining whether the prohibition against billboards is a permissible time, place and manner regulation, the proper test is whether (1) the regulation is content neutral, (2) it serves a significant governmental interest, and (3) it leaves open ample alternative means of communication.

Finally, the traditional "rational basis" standard of review is the proper test for determining due process claims regarding zoning and land use regulations. The California Supreme Court properly applied this test in upholding San Diego's ordinance. On this ground also, its decision should be affirmed.

ARGUMENT

A. THE TEST FOR REVIEWING FIRST AMENDMENT CLAIMS REGARDING A PROHIBITION AGAINST BILLBOARDS ARTICULATED IN *JOHN DONNELLY & SONS* V. *MALLAR* AND USED BY THE CALIFORNIA SUPREME COURT BELOW FAIRLY BALANCES THE COMPETING PUBLIC AND PRIVATE INTERESTS IN DISSEMINATING AND RECEIVING INFORMATION, PRIVACY, PUBLIC SAFETY AND A LIVABLE ENVIRONMENT; ACCORDINGLY, THAT TEST SHOULD BE APPROVED AND APPLIED BY THIS COURT.

The central question posed in this case is whether San Diego's billboard ban is a "time, place and manner" regulation having only a constitutionally permissible "incidental effect" on speech. Employing the test adopted in *John Donnelly & Sons* v. *Maller,* 453 F.Supp. 1272, 1277 (S. D. Maine 1978), the California Supreme Court below answered that question affirmatively. (Jurisdictional Statement [hereinafter "JS"] 21a.)

In *Mallar, supra,* the court was faced, not just with a *city-wide* ban on billboards, but a *state-wide* elimination of off-premises, outdoor "billboard" advertising. The *Mallar* court, at 1277, adopted the test previously articulated by this Court in the context of regulation of commercial speech:[5]

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[5] The Maine statute, as described in *Mallar, supra,* at 1276, exempted certain classes of signs, including temporary signs "pertaining to charity drives and political campaigns" as well as signs "erected by churches and civic, historical and cultural organizations and signs which serve public functions." Thus, the Maine statute would allow some of the off-site messages carried on Appellants' signs in San Diego but would prohibit others.

> To constitute a legitimate time, place, or manner restriction, a regulation must satisfy three criteria: (1) the restriction on speech must be "justified without reference to the content of the regulated speech," (2) the restriction must "serve a significant governmental interest," and (3) in so doing, the restriction must "leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board* v. *Virginia Consumer Council* [425 U. S. 748, 96 S.Ct. 1817 (1976); other citations omitted.]

Appellants, although somewhat obliquely, suggest that the test adopted and applied in *Mallar* is inappropriate. Appellants feel that this test is too easy to meet:

> Any effort to destroy an entire medium could be viewed as content neutral; arguably "significant" governmental interests abound; alternative sources may ... always be found in the media which remain .... (Appellants Brief, at 30.)

Instead of the *Mallar* test, Appellants suggest that this Court should strictly scrutinize San Diego's sign ordinance and

> require the *state* [emphasis in original] to demonstrate a significant public interest, furthered by a narrowly-drawn regulation, specifically tailored to accomplish the legislative goal .... (Appellant's Brief, at 36.)

Moreover, "narrowly drawn," according to Appellants, means that "should less restrictive means be available, the [legislative] effort [to regulate or prohibit off-site billboards] must fail." *Id.*

Appellants argue that strict scrutiny is necessary because of "competing constitutional concerns." (Appellants' Brief, at 35 *et seq.*) The cases cited by Appellants, however, are distinguishable or completely inapposite. Appellants cite *Troyer* v. *Town of Babylon,* 483 F.Supp. 1135 (E.D.N.Y. 1980), *aff'd*

mem. sub nom Troyer v. *Town of Southampton,* 628 F.2d 1346 (2d Cir. 1980), *aff'd,* 49 U.S.L.W. 3371 (U.S. November 17, 1980). In that case, which involved a local law prohibiting door-to-door distribution of literature and solicitation without the prior consent of occupants but exempting persons who had resided in or maintained a business in the town for 6 months, the ordinance was held unconstitutional *as applied,* not on its face. *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 1162, 100 S.Ct. 826, ____L.Ed. 2d____ (1980) dealt with a local law requiring "charitable" organizations to prove that 75% of funds solicited actually went to charitable uses before they could be allowed to solicit funds door to door. The Court held that this attempt to protect citizens from fraudulent solicitation placed an impermissible burden on the exercise of First Amendment freedoms and that the goal could be accomplished by other means.[6] *Consolidated Edison Co.* v. *Public Service Commission,* ____U.S.____, 100 S.Ct. 2326 (1980) involved an attempt to regulate the content of speech by public utility companies through the prohibition of discussion of "controversial issues" in inserts in billing envelopes. *Carey* v. *Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) also dealt with a content regulation, advertisement of contraceptives, and involved an impermissible invasion of the right to privacy.

Appellants also argue that "[s]till more exacting scrutiny" is required because "the San Diego ordinance is not a mere regulation but an absolute prohibition." (Appellants' Brief, at 36.) The California Supreme Court correctly perceived the speciousness of Appellants' argument in pointing out that

[6] Door-to-door distribution and solicitation cases involve one on one encounters where the distributor or solicitor may be turned away at the request of the occupant of a household. The one-on-one intrusion into the peaceful enjoyment of the home is qualitatively different from the intrusion into the peaceful enjoyment of the environment caused by billboards. The residents of the community cannot avoid their intrusion.

Appellants admit "that a ban covering 97 percent of the city is merely a 'regulation,' while the extension of that ban to the remaining 3 percent of the city is a 'prohibition.' " (JS 17a.)

In *Goldblatt* v. *Town of Hempstead,* 396 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962), this Court cogently stated at 592,

> It is an oft-repeated truism that every regulation necessarily speaks as a prohibition.

San Francisco respectfully submits that Appellants' contention with respect to the total ban aspect of San Diego's ordinance begs the question of whether speech is impermissibly impaired in this case. This Court has never held that there is a constitutional right to a particular mode of expression or to the most cost-effective means of communication.

An inherent difference between billboards and handbills or door-to-door solicitation is implicit in the third part of the *Mallar* test. A total ban on leafleting or door-to-door solicitation would leave an indigent speaker with no alternative means to communicate his message. On the other hand, ample alternative channels of communication may remain available to any speaker who can afford to pay for billboard advertising. As the *Mallar* court noted, at fn. 10, at 1280, outdoor advertising amounted to a mere 1.2% of the total advertising expenditures nationwide. Moreover,

> *Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether, and thus remain available for commercial and noncommercial advertising alike.* In short, the Maine Act clearly leaves open numerous alternative channels for communication of the information now carried by off-premises billboards. It thus meets the third prong of the "time, place or manner" test. (Emphasis added.) *Id.*

Appellants admit that billboard advertising "raises certain problems unique to it." (Appellants' Brief, at 22.) Appellants, however, fail to identify these problems and to discuss the competing public and private interests which this Court must weigh in determining whether San Diego has balanced these interests in a manner consistent with First Amendment protections. For example, Appellants totally ignore the interest in personal privacy which billboards by their very nature invade. This Court has long recognized that billboard advertising relies upon a captive audience, thus invading rights of privacy. In *Packer Corporation* v. *Utah,* 285 U.S. 105, 110, 52 S.Ct. 273, 76 L.Ed. 643, 647 (1931), this Court recognized the intrusive nature of billboards and stated:

> [Billboard] advertisements . . . are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard .... These distinctions clearly place this kind of advertisement in a position to be classified so that regulations *or prohibitions* may be imposed upon all within the class . . . . (Emphasis added.)

Appellants urge this Court both to limit the types of governmental interests which may justify such a prohibition so as to exclude aesthetic or environmental concerns and to require a state or local governmental entity to prove that its regulation of their industry is needed to secure its objectives. The imposition of such limitations, however, is neither a necessary device to protect First Amendment freedoms nor a prudent method for balancing competing interests. Moreover, the second prong of the *Mallar* test, requiring the regulation to serve a significant governmental interest, strikes a fair balance between the competing interests of public safety and privacy as

well as environmental concerns on the one hand and the interests of disseminating and receiving information on the other.

Appellants do not dispute that aesthetics is a legitimate state interest; instead, they imply that aesthetics is not a significant governmental interest because "aesthetic judgments relate to matters of taste, tone and mood." (Appellants' Brief, at 44.) Appellants' claim should be rejected for the following reasons:

First, the fact that a legislative proscription arises out of a debatable legislative judgment does not mean that the governmental interest to be served by that judgment is any less significant. If such were the case, even safety regulations would not serve significant governmental interests because such regulations as speed limits and minimum age for operating automobiles necessarily require the exercise of judgment with which reasonable persons may differ.

Second, in holding "that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation", the *Mallar* court recognized, at 1278,

> The nation's recently-awakened and growing concern for the quality of its environment and the various and widespread steps taken by individuals, citizen groups, and governmental bodies to protect and enhance natural resources demonstrate beyond reasonable question that the Maine Act serves substantial governmental interests through the preservation of aesthetic values.

See also *Berman* v. *Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954), quoted with approval in *Mallar, supra,* at 1278.

Third, even the billboard industry itself recognizes that its structures may adversely affect the environment in which they are located. In its amicus curiae brief filed in support of

Appellants, Outdoor Advertising Association of America (OAAA) admits that the industry

> [has promulgated] a code of recommended practices which recognizes the importance of locating outdoor advertising signs only in commercial and industrial areas, and support[s] ... federal, state and local regulations which implement that policy. (Amicus Brief of OAAA, at 1.)

OAAA further stated in their amicus brief that

> 17 counties and 209 cities within [California] have already completely prohibited outdoor advertising. Many of these ordinances have not been directly challenged because they preclude billboards from localities which are particularly scenic or principally residential in character without appreciable commercial or industrial activity. (Amicus Brief of OAAA, at 2.)

The California Supreme Court properly rejected Appellants' argument below that an urban community is entitled to less environmental protection than that afforded a suburban or rural community. It should require no argument that citizens of an urban community are entitled to be spared from blight no less than are the residents of suburbs and rural areas. San Francisco's sign ordinance recognizes the importance of preserving the beauty and distinctive character of our city. Although the promotion of economic and traffic safety interests are included among the stated purposes of San Francisco's sign ordinance, aesthetics and environmental concerns were also primary objectives in the enactment of that sign ordinance.[7]

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[7] San Francisco City Planning Code Section 601 states the purposes of the sign ordinance and provides in pertinent part as follows:

> [I]t is the further purpose of this [ordinance] ... to protect ... the character and dignity of public buildings,

(Footnote continued on following page)

Appellant's arguments with respect to the burden of proof governmental bodies must bear to demonstrate the relationship between the billboard regulation and the objectives sought to be served thereby are even more pernicious than their attempt to limit the types of permissible state interests. While the test employed by the *Mallar* court and the California Supreme Court requires only that the state or city show that sign regulations "serve" a significant state interest, Appellants contend that the government must prove a direct relationship.

Under the *Mallar* test, a trier of fact can easily infer that decreasing the size or number, or eliminating entirely, larger-than-life advertisements serves the interest in freedom from visual pollution,[8] and that the challenged regulation therefore serves a significant governmental interest. Under a "direct relationship" test, billboard companies, like Appellants herein, are given an opportunity to confuse and complicate the issue of aesthetics by offering "expert" opinion on the validity of billboards as "big art."[9] Moreover, since most regulations permit on-site advertising and exempt certain types of off-site

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> open spaces and thoroughfares; to protect the distinctive appearance of San Francisco which is produced by its unique geography, topography, street patterns, skyline and architectural features; . . . .

[8] Indeed, despite Appellants' contentions that billboards may be considered as having artistic merit, it is difficult to imagine how a reasonable person could conclude that a series of 12 by 24 foot structures, irrespective of what is painted on them, is more aesthetically pleasing than a view of such natural and man-made scenic phenomena as the Golden Gate Bridge, Coit Tower, or the San Francisco Bay, to give but a few examples.

[9] Appellants' argument that billboards are "big art" and have won numerous art awards is irrelevant. The art award is for the poster art on the billboards, not for the unsightly billboard structures themselves. San Francisco is unaware of any billboard structures that have won architectural design awards. The sign regulations are not designed to impede the development of pop-art or poster art; rather, they seek to regulate the time, place and manner of off-site advertising.

signs, billboard companies can always claim that unless *all* signs are eliminated, no direct relationship exists between sign regulations and the promotion of aesthetic or environmental interests.

Appellants contend that San Diego has not proved that billboards have caused the death of or serious injuries to motorists. San Francisco submits that Appellants' contentions demonstrate their cavalier attitude towards human life. Traffic accidents often are caused by a combination of a multitude of factors not easily severed and examined one by one to determine which of those factors in fact contributed to the accidents. Under the "direct relationship" test, governmental entities would never be able to enact safety regulations as a preventive measure, but would have to wait until unnecessary injuries or deaths have occurred.

Furthermore, it cannot be seriously disputed that the promotion of the economic well-being of the community and its residents is not a compelling governmental interest. In scenic communities such as San Francisco and San Diego, where tourism is a major industry, a trier of fact may properly infer that the elimination of billboards tends to preserve the natural beauty, and to promote the economic interests, of the community. Under the "direct relationship" test urged by Appellants, whether a particular regulation actually promotes the economic interests of a community must be proved by empirical evidence. It would be virtually impossible for a governmental entity to produce evidence to prove the causal relationship between the presence of billboards and a decrease in the volume of tourist trade.

If this Court were to adopt the "direct relationship" test urged by Appellants, San Francisco respectfully submits that governmental entities seeking to enforce even modest anti-billboard regulations must face serious, if not insurmountable, difficulties in proving the validity of those regulations.

Finally, Appellants suggest that no regulation of billboards can be upheld if "less drastic" means of achieving the governmental interest can be conceived. The *Mallar* court, in

requiring only that the state show that "ample means of communication" remain available, implicitly recognized the inappropriateness of the "least drastic means" test. Indeed, under the test advocated by Appellants, the numerous suburban and rural communities which have never permitted billboards within their jurisdictions would now, for the first time, be required to amend their laws to allow off-site advertising. Moreover, in jurisdictions which permit off-site advertising but restrict the size, height, and density of billboards, courts would be asked to adjudicate such unanswerable questions as whether the governmental interest in promoting safety is served by a size limitation which is less than the standard size (12 by 24 feet) billboard.

The problems inherent in employing the least restrictive means test are perhaps most readily apprehended in the context of a regulation governing the density of signs. For example, if a state or local entity determined that off-site advertising signs should be located no less than 1,000 feet apart, such a regulation may be upheld under the *Mallar* test so long as the regulation is content neutral, serves significant governmental interests and affords ample alternative means of communications. See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 65, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976). Under the "least restrictive means" test, the governmental entity must show that the interests served by the 1,000 feet limit could not be achieved by a spacing limitation of 200 or 500 or 999 feet. Such judgments are, of course, debatable; and the judiciary has traditionally and wisely refrained from substituting its judgment for that of the legislature.

Furthermore, as San Diego emphasized, any distinction between the standard of review applicable to a prohibition and that applicable to a regulation is ludicrous. Using the example above (a 1,000 feet spacing limitation), a billboard company could assert that such a limitation diminishes the kind of exposure which, according to amicus curiae OAAA, produces

the cost-effectiveness that makes billboard advertising so desirable. (See OAAA Brief, Appendix.)

Thus, it is clear that the "least drastic" means test is unrealistic and provides protections to the billboard industry which are not afforded by the First Amendment to other communications industries. That test should be rejected by this Court.

In view of the foregoing, it is respectfully submitted that the correct standards for reviewing First Amendment claims regarding prohibitions on, as well as regulations of, off-site advertising are embodied in the three-pronged test applied by the *Mallar* court and the California Supreme Court below. Those standards should be adopted by this Court in this case.

B. THE CALIFORNIA SUPREME COURT CORRECTLY APPLIED THE *MALLAR* STANDARD OF REVIEW TO APPELLANTS' FIRST AMENDMENT CLAIMS REGARDING PROHIBITION AGAINST BILLBOARDS.

1. The California Supreme Court Correctly Determined that San Diego's Regulation Is Content Neutral.

Appellants' contention that the San Diego sign ordinance seeks to regulate the content of speech because it distinguishes between off-site and on-site advertising is wholly without merit. The provisions of the San Diego sign ordinance do not prohibit any particular message. Enforcement of the ordinance will eliminate billboards, but it will not prohibit the transmission or receipt of the messages contained on those structures. The distinction between off-site and on-site advertising is no more than a limitation on the place where particular messages may be transmitted. Appellants and their amici curiae urge this Court to extend the protection of the First Amendment afforded to speech itself, to the billboard structures, the medium.

Moreover, the fact that the San Diego ordinance includes certain exemptions for off-site advertising does not mean that

the ordinance seeks to regulate the content of the messages. More extensive exemptions were noted in the Maine statute in *Mallar, supra.* Despite those exemptions, the court there determined that the Maine Act did not purport to "prohibit the transmission of any particular message" and the purpose and effect of that statute was "to eliminate off-premises advertising." *Mallar, supra,* at 1277.

Accordingly, it is clear that a prohibition against billboards is not a regulation of the content of speech but is rather a content-neutral "time, place and manner" regulation. The fact that the billboard industry sells media rather than meat balls should not entitle it to any greater protection under the First Amendment than is afforded Campbell Soups.

2. The California Supreme Court Properly Concluded that San Diego's Ordinance Serves A Significant Governmental Interest.

The California Supreme Court held that the San Diego ordinance "serves significant governmental interests—promoting traffic safety and improving the appearance of the community—unrelated to the suppression of free expression." (JS 22a.) Appellants do not dispute that traffic safety is a significant governmental interest. Rather, Appellants argue that San Diego failed to prove a direct relationship between traffic safety and the prohibition against billboards. Under the *Mallar* test, however, Appellant's admission that billboards are designed to, and do, attract motorists' attention away from the road (C. T. 145-146, 488-489) provides a constitutionally sufficient foundation for the conclusion that San Diego's ordinance promotes the significant governmental interest in traffic safety.

Furthermore, if this Court accepts the "emerging majority position" that the "preservation and promotion of aesthetic standards do serve as an adequate basis for anti-billboard legislation" *(Mallar, supra,* at 1278, and cases cited therein), this Court must uphold the determination of the California

Supreme Court that San Diego's ordinance serves that governmental interest. Appellants themselves do not raise insufficiency of evidence on this issue. [10]

3. In Light of the Limited Construction Given to San Diego's Ordinance by the California Supreme Court, the Court Below Properly Concluded that the Ordinance Allows Ample Alternative Means of Communication.

Although the San Diego sign ordinance does not define off-site advertising, the California Supreme Court narrowly construed the term, "off-site advertising," by adopting the definition of that term in California Revenue and Taxation Code Section 18090.2:

> a rigidly assembled sign, display, or device permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.

This Court has consistently stated that it is not within its province to construe and narrow state laws. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2302, 33 L.Ed. 2d 222, 228 (1972).

Appellants rely heavily on San Diego's stipulation that

> [m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally [*sic*] expensive (JS 126a.)

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[10] In fact, the paucity of evidence in the record regarding the arbitrary nature of this regulation speaks eloquently for Appellants' consuming obsession with a plethora of compelling interests and cognate standards of review where the presumption in favor of legislation is abandoned and government is put to the oftimes stygian task of gainsaying the billboard companies' paid "expert."

to support their contention that the California Supreme Court erred in finding that ample alternative means of communication remain available to advertisers in San Diego. In light of this limited construction of the ordinance, however, Appellants' reliance on San Diego's stipulation is misplaced.[11]

That the construction given by the California Supreme Court substantially narrows the application of San Diego's ordinance is readily apparent. The ordinance as written permits numerous means of off-site advertising, including, among others, bench signs at designated public transit bus stops, signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible on the boundaries of the premises, buses and taxi-cabs, licensed commercial vehicles, temporary off-premise subdivision directional signs and temporary political campaign signs. (JS 111a-112a.)[12] As interpreted by the California Supreme Court, however, the ordinance will permit, in addition to the exemptions listed in the ordinance, all outdoor advertising signs not permanently affixed to a building or permanently attached to the ground. Therefore, the California Supreme Court properly concluded that the San Diego ordinance, as construed, provided ample alternative means of communication.

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[11] The stipulation itself is puzzling if not devoid of any meaningful content. It is stated in the most conclusory language: the terms "insufficient" and "inappropriate" are inherently vague, and Appellants do not attempt to explicate them. This Court's disposition of transcendental constitutional questions must not be muddled or manipulated by the happenstance of artfully or vaguely drafted stipulations between two adversaries with something less than the exegesis of the United States Constitution in mind.

[12] Since the ordinance was attacked on its face, the California Supreme Court was not persuaded by the vague and conclusory stipulation concerning the lack of alternative means of communication. Given the numerous alternative means for off-site advertising provided under the exemptions in the San Diego ordinance, Appellants and their Amici Curiae's claim that the California Supreme Court addressed this issue in a cavalier manner is at best hyperbole and at worst down-right dishonesty.

In view of the foregoing, it is respectfully submitted that the San Diego ordinance meets the tripartite test for a time, place and manner regulation. The California Supreme Court correctly applied that test in this case and its decision should be affirmed.

C. THE TRADITIONAL "RATIONAL BASIS" STANDARD OF REVIEW IS THE PROPER TEST FOR DETERMINING DUE PROCESS CLAIMS REGARDING ZONING AND LAND USE REGULATIONS.

Appellants claim that the California Supreme Court erred in three distinct ways in upholding the ordinance: first, the court attached a presumption of validity to the ordinance; second, the court failed to consider whether less restrictive means were available to achieve San Diego's asserted goals; and, third, the Court failed to find a violation of due process rights even though the ordinance effectively eliminated Appellants' business as it is presently conducted. See Appellants' Brief, at 34. In essence, Appellants urge this Court to employ a strict scrutiny test in reviewing an ordinance which is a land use and zoning regulation.

It is settled that a presumption of validity favors legislation and that if any facts could reasonably be presumed to support the legislative judgment, the statute will be upheld. *Goldblatt* v. *Town of Hempstead, supra*; *Village of Belle Terre* v. *Boras,* 429 U.S. 252, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974). This presumption has less force when the ordinance regulates expression. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215, 95 S.Ct. 2268, 2276, 45 L.Ed. 2d 125 (1975).

As fully demonstrated by San Diego, San Francisco, and amicus curiae City of Alameda, the ordinance is a content neutral zoning regulation with only incidental effects on free speech; therefore, the presumption of validity remains. The record is devoid of any evidence showing that Appellants had overcome this presumption of validity. The California Supreme

Court was compelled to defer to the legislative judgment once substantial public interests were perceived and a rational relationship between those interests and the regulations was identified. The California Supreme Court applied the proper test correctly in this case, and its decision should be affirmed.

The second claim for invalidity is based on the alleged First Amendment issues and is no more than a reiteration of the strict scrutiny test advocated by Appellants. Since the California Supreme Court concluded that the San Diego ordinance was content neutral, it correctly refused to apply the test urged by Appellants. This Court should affirm the decision below.

Under the banner of the First Amendment, Appellants seek to resurrect the outmoded and disfavored doctrine of substantive due process in the context of business regulation. That myopic conception of legislative prerogative, given its final and most extreme application in *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), was set to rest in *NLRB* v. *Jones and Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 119, 81 L.Ed. 893 (1937). Since then, this Court has consistently and repeatedly declined any invitations to engage in the type of nitpicking analysis that Appellants, by invoking the First Amendment shibboleth, attempt to foist upon this Court. See *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 258-259, 83 S.Ct. 348, 13 L.Ed. 2d 258 (1964) and *United States Railroad Retirement Board* v. *Fritz,* ____U.S.____ C.C.H. B311, Docket No. 70-870, decided December 9, 1980.[13]

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[13] Although these decisions were written in other contexts, i.e., the commerce clause power of the U.S. Congress and equal protection safeguards embodied in the Due Process Clause of the Fifth Amendment, the separation of powers principle on which they are founded has equal application in the instant case. The analysis in these cases is founded on and moves from the premise that the legislature is most competent to identify problems and develop solutions to them.

San Diego's sign ordinance, like any other exercise by the state of its police power, should be afforded the broadest deference by the judiciary. Appellants are corporate enterprises selling access to a medium of communication. They do not have a message to communicate. The City of San Diego, provided that it has a basis in reason for prohibiting billboards, should be able to apply that regulation to media merchants in the same manner that it may prohibit pig farming within its city limits. San Francisco has fully analyzed the free speech issues within the framework of the body of law interpreting the First Amendment in the previous section and has set forth ample reasons why this Court should reject the least restrictive means test.

Finally, while Appellants claim that the California Supreme Court erred in determining that there was no due process violation because the ordinance would eliminate their business as presently conducted, Appellants utterly fail to discuss the issue of whether the prohibition is so complete as to effect a taking of property.[14] Instead, Appellants attempt to append the First Amendment rights of their advertisers to give the billboard industry a due process claim. See Appellants' Brief, 26-41.

Appellants argue that because the San Diego ordinance is an absolute prohibition, it must be strictly scrutinized by this Court. The cases cited by Appellants in support of this argument are not apposite.[15]

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[14] The due process issues related to amortization are raised in San Diego's Conditional Petition for Writ of Certiorari filed with this Court in August, 1980. This Court has taken no action on that Petition as of the time of this writing.

[15] *Talley* v. *California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) involved an ordinance which prohibited the distribution of handbills at any time, anywhere, unless the names and addresses of those who prepared, distributed or sponsored them were filed with officials. *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.

(Footnote continued on following page)

Appellants found their due process claim on the ground that the California Supreme Court upheld the ordinance on the basis of two governmental interests—traffic safety and aesthetics—and contend that those interests are insufficient to stand muster under the strict scrutiny standard of review. See Appellants' Brief, at 41. Appellants rely almost exclusively on Pennsylvania cases holding that

> a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, moral and general welfare than an ordinance which merely confines that business to a certain area in the municipality. *Exton Quarries, Inc.* v. *Zoning Board of Adjustment*, 425 Pa. 43, 59-60, 228 A.2d 169, 179 (1967).

The language "more substantial relationship" is antithetical to the concept of a system of laws rather than of man. A constitutional rule of law founded on the vague contours of the comparative and superlative hardly promotes a workable rule of law. The words "more substantial" fail totally to articulate standards to be followed by legislatures in the enactment of statutes, and by courts in reviewing statutes.

Aside from the First Amendment issues, Appellants fail to provide any support for their contention that the traditional rational basis test should be discarded by this Court in favor of

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1213 (1940), *Lovell* v. *Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), *Schneider* v. *State*, 308 U.S. 147, 67 S.Ct. 146, 84 L.Ed. 155 (1939) and *Saia* v. *New York*, 334 U.S. 58, 68 S.Ct. 1148, 92 L.Ed 1574 (1948) are all cases involving ordinances which prohibited door to door solicitation without a permit. As pointed out by Justice Rehnquist in his dissenting opinion in *Village of Schaumburg* v. *Citizens, supra*, at 100 S.Ct. 838, a majority of these decisions turned primarily, if not exclusively, on the broad discretion vested in municipal authorities to grant or deny permits on the basis of vague or even non-existent criteria. None of those factors is present in this case.

a more stringent test in its review of San Diego's sign ordinance. Appellants' argument, if given any force by this Court, would effectively destroy any local government's ability to meet the changing social and economic needs of its citizens through land use regulation. For example, a developing town would be unable to exclude a stockyard simply because it has existed for a long time despite a legislative determination after a careful balancing of the various public interests that it has become undesirable.

Based on the foregoing, it is respectfully submitted that the California Supreme Court properly rejected Appellants' argument that a "more substantial" relationship between the exercise of the police power and the public health, safety, morals and welfare must be shown where the police power is exercised to prohibit a business which was not considered a public nuisance under the common law. Its judgment should be affirmed.

CONCLUSION

The ordinance before this Court is a zoning regulation with only an incidental effect on the free exercise of speech. It is clearly a time, place and manner regulation and no more. The three-prong test employed by *Mallar, supra*, is more than sufficient to safeguard the First Amendment rights of those who wish to use off-site advertising. The test urged by the Appellants is one which this Court has traditionally reserved for reviewing ordinances which allegedly infringed upon the exercise of speech or the right to receive information or which allegedly discriminated on the basis of the content of information. No such claim can be made by Appellants in this case. This Court has never held, and should not now so hold, that mere time, place and manner regulation should be subjected to strict scrutiny. Moreover, Appellants' due process claim is meritless and should be rejected.

In view of the foregoing, it is respectfully submitted that the decision of the California Supreme Court is correct and should be affirmed.

Dated: December 23, 1980

Respectfully submitted,

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